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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. O'DONNELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CHRONOLOGICAL OUTLINE OF EVENTS

Respondents in their brief (pp. 31–45) raise and give principal emphasis to a boundary question which was decided against them in both courts below and was not treated in the brief for the United States. The facts of the case are complicated; the record is voluminous and confusing. Proper understanding, particularly in regard to the boundary question, requires an outline of the principal events in the long history of this land claim. These salient facts, grouped and arranged as nearly chronologi-

cally as may be, are set forth for the convenience of the Court as follows:

1. *1841: Castro Grant.*—Aside from adverse possession (Brief for the United States, 18–30, and *infra*), the United States asserts title as the successor of Victor Castro who claimed Mare Island by grant on May 20, 1841, from Alvarado, the "regular constitutional governor of the department of the Californias." The grant, which the successors of Castro produced, is set forth at R. 19 (Exhibit A, to Complaint) and 250–251 (transcript of record before Board of Land Commissioners). It was offered and received in evidence as recorded in Spanish, together with a translation (R. 301, 479–480; see Pl. Ex. D, original). The original presumably was destroyed in the earthquake and fire of 1906, since the Mexican archives were kept in the San Francisco office of the Surveyor General of the United States for California where all but a few were destroyed in the fire (R. 213). Counsel stipulated the succession of the United States to "any right, title, or interest that Victor Castro had" (R. 214, 216).

2. *1846–1848: War with Mexico and recognition of native property rights.*—(For materials on guarantee of property rights, see Brief for the United States, p. 5.)

3. *1850: Report of "Smith" board and first executive reservation.*—On March 31, 1850, a board of naval officers, under Commander Smith, recom-

mended to the Secretaries of War and Navy that lands on both sides of Mare Island Straits be reserved for public purposes (R. 331–336). Accordingly, on November 6, 1850, President Fillmore so reserved the lands, including "Mare Island" (R. 327–329).

4. *1850: Admission of California and passage of Swamp Act.*—California was admitted to the Union on September 9, 1850. Nineteen days later, on September 28, 1850, the President approved an act granting to the states "the whole of those swamp and overflowed lands" of the public domain within their borders. 9 Stat. 519. It may be admitted that the lands here in controversy (with the exception of a "sand ridge" or barrier of dunes thereon) were marsh lands at that time and subsequently, as shown by the surveys hereafter noted.

5. *1851: Mexican Claims Act.*—On March 3, 1851, the President approved an act to carry out the treaty pledge regarding property rights of natives. All persons claiming under Mexican or Spanish grants in California were permitted to seek confirmation of their claims before a commission composed of three members; and an "agent" was provided to "superintend the interests of the United States." Claimants or the Government could petition for review in the district courts and in the Supreme Court. 9 Stat. 631. (See Brief for the United States, 5–6.)

6. *1852: Proceedings before the Board of Land Commissioners and District Court.*—On August 31,

1852, George W. Bissell and William H. Aspinwall, as successors of Victor Castro (R. 251–276, 291–295), filed their petition with the Board of Land Commissioners for the confirmance of the Mexican grant (R. 220). They submitted a document purporting to be the grant from Alvarado to Castro, in addition to an earlier permit "to occupy with horses the Island" (R. 248–251).

The claimants produced Alvarado, former governor, who stated, by deposition of October 10, 1854, that he had made the grant at the time and place represented on the document (R. 226–237); M. G. Vallejo, who testified, by deposition of October 19, 1854, that Castro had occupied the Island since 1840 and that he, Vallejo, had seen Castro's title papers "some twelve years ago," which he identified as the documents presented to the Land Commissioners (R. 237–239); and J. J. Castro, a brother, who, by deposition of October 19, 1854, also testified to the occupation of the Island by Victor Castro since 1840 (R. 239–243). The United States produced Stephen Cooper who, by deposition of April 20, 1854, testified that he had seen the grant sometime in 1850 at which time he thought the grant (as distinguished from the license for occupation) had been forged by someone because the writing comprising the grant "was not there in the winter of 1847 and 1848," but he did not know whether he had "noticed the difference by ocular inspection or whether it was hear-

say" (R. 222–225); William McDaniel who, by deposition of November 1, 1854, also testified that he had seen the document in 1850, at which time it was merely a paper permitting the use of the Island as pasture, but that sometime later in the same year he heard from Stephen Cooper that the latter had seen the paper with the grant written on it (R. 244–245); and L. B. Mizner who, by deposition of November 4, 1854, also testified that he had seen the document in 1850 and had noted that "on the first page" there was a "permit to pasture horses on the Island," but he was unable to say what the paper contained on its back though his "impression" was that the grant was not anywhere on the paper when he examined it (R. 245–247).

In May 1855, the Land Commissioners gave their opinion, stating that "strong suspicion has been raised" as to the time the alleged grant "was made and executed." However, the Board felt that the "negative" testimony of the Government did not warrant it "in discrediting entirely the testimony of Governor Alvarado" (R. 277–279). On May 8, 1855, the decree of confirmation of the grant by the Board was filed (R. 279–280, also 704). Transcripts of the proceedings were transmitted to the district court and the Attorney General of the United States (R. 280–282).

On February 18, 1856, the United States petitioned the district court that the decision of the Board be reversed (which was done "in every

case" as a matter of course, 7 Op. A. G. 672 at 675), and the plaintiffs filed a petition asking the affirmance of the decision (R. 283–284). On March 2, 1857, the district court made an order directing the entry of the decree of confirmation (R. 290), but the actual decree, although prepared, was not signed by the judge or entered (R. 285–286). On April 1, 1857, an appeal to the Supreme Court was sought by the Government (as was customary pending a determination by the Attorney General whether to prosecute appeals, 7 Op. A. G. 672–676, 8 Op. A. G. 515–517) and allowed but was later vacated (R. 286–288) along with the dismissal of appeals in 434 other cases (8 Op. A. G. 515 at 516).[1] On April 15, 1930, at the request of the Government, a decree was signed and entered *nunc pro tunc* as of March 2, 1857 (R. 20, 289–291).

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[1] In this connection it is significant that Attorney General Cushing had a perfect record of defeats in the Supreme Court of the United States in all California land cases appealed by the Government. *United States* v. *Ritchie*, 17 How. 524 (1854); *Fremont* v. *United States*, 17 How. 542 (1854); 18 How. 30 (1855); *Arguello* v. *United States*, 18 How. 539 (1855); *United States* v. *Reading*, 18 How. 1 (1855); *United States* v. *Cruz Cervantes*, 18 How. 553 (1855); *United States* v. *Vaca*, 18 How. 556 (1855); *United States* v. *Larkin*, 18 How. 557 (1855); *United States* v. *Peralta*, 19 How. 343 (1856); *United States* v. *Sutherland*, 19 How. 363 (1856). It was not until later, as respondents point out (Resp. br., 57), that sensational disclosures of fraud on the part of Mexican claimants changed the course of decision. This change, broadly speaking, explains the treatment of the Castro grant as fraudulent in *Bouldin* v. *Phelps*, hereafter discussed in the text.

7. *1852: The "Sloat" Board report.*—On November 6, 1852, a board of naval officers under Senior Officer J. D. Sloat "appointed to examine the shores and waters of the Bay of San Francisco in California, for the purpose of selecting a site for a Navy Yard and Depot" (R. 337), submitted a report pointing out the great need for a naval station (R. 340) and recommending Mare Island as the most favorable site (R. 351–357). On December 13, 1852, the Secretary of the Navy requested the board to give its estimate of the value of the Island; their reply, dated from Washington on the same day, estimated its value "for the contemplated uses of the United States at one hundred thousand dollars" (R. 324–325).

8. *1852: Purchase by United States.*—The Sloat Board had negotiated with Bissell and the other claimants for the purchase of the Island, but had reached no agreement and had referred the matter of a purchase to the Secretary of the Navy (R. 367–374). On December 15, 1852, the claimants agreed to sell the Island to the United States (R. 312–316, see also 316–323). A deed was executed on January 4, 1853 (R. 295–299, same 22–26, 302–306). On February 28, 1853, the vendors executed a bond in favor of the United States conditioned upon their undertaking to "at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances" and to "indemnify and

save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof, be made and thereafter successfully established against the title proposed to be conveyed * * * by which the full and perfect title of the United States * * * may be in any wise impaired, diminished, or destroyed * * *" (R. 308–312).

9. *1853: Second reservation of site by President.*—On February 9, 1853, the Secretary of the Navy wrote the President, indicating the selection of the Island as the site for the navy yard and requesting that it "be reserved to the United States." On February 11, 1853, the President made the reservation as recommended (R. 379–381, same 28–30, 726–727), which was thereafter recorded (R. 382–383, 724–726, 728–729, 729–731).

10. *1854: California's consent to the purchase.*—On May 11, 1854, California by statute gave its consent "to the purchase by the United States of * * * Mare Island" for use as a naval and military reservation (and incidentally relinquished its title or interest to "beach" or tide lands on the eastern shore of the island from its southern point to the northern limits of "the highlands"), but provided that its consent to the purchase (and relinquishment of title) should not be construed as a satisfaction "of any conveyance or bond for title to the United States of the same

land" or as a recognition by the state "of any claim, title, or grant." Cal. Stat. 1854–1855, pp. 48–49; see also R. 457–458. 558.

11. *1856: State survey No. 34 of Swamp and Overflowed Land.*—On October 2, 1856, the lands here in dispute were surveyed by the Deputy County Surveyor of Solano County as "Survey No. 34 of Swamp and Overflowed Lands" (R. 383–387, see also 903, 947). It should be noted, however, that this is a state survey and that the lands thus surveyed cannot be located on any "approved and accepted *sectionized* survey of that particular tract of the United States Land Office" because no such *sectionized* survey by the land office exists (R. 390). [Italics supplied.]

County surveys.—In addition to this "Survey No. 34," three other surveys are mentioned in the record. On November 19, 1852, the County Surveyor for Solano County, at the request of Vaughn, Harkness, and Bynum, surveyed the highlands of Mare Island, south of the area here in dispute, under statutes relating to school lands (R. 752–757; Calif. Stats., 1852–1853, pp. 41–43). A similar survey under the same statutes was made for Josiah Hanscom on November 16, 1854, by County Surveyor Patton of Solano County, covering the lands here in dispute (R. 752, 757–759). It may be noted that these surveys, under the express provisions of the state statute, could not "prejudice the ownership or possession" of any lands held or

claimed under Mexican grants (*id.*, Sec. 6). On June 11–12, 1855, County Surveyor Patton again surveyed the lands for David N. Darlington (R. 587–589, 591–593; erroneously referred to as "Dyer Survey," 215). This survey reappears in "a tracing of a portion of Mare Island, prepared October 1900, to accompany papers relating to the claim of E. H. Sawyer to 165.55 acres of Swamp and Overflowed Land" (R. 455–456, 787–789).

12. *1857: State patent to Darlington.* — On March 18, 1857, the State of California issued its patent to the lands here in dispute, usually known as "Swamp and Overflow Survey No. 34," to David N. Darlington (R. 30–33) who divided his interest with Moody, Hanscom (who had had the lands surveyed under the school lands legislation, *supra*), and Secor (R. 388–389), all of whom were in some capacity connected with the Navy Yard (Gregory, *History of Napa and Solano Counties, California*, pp. 77–86). On June 6, 1879, 22 years after its issuance, the Darlington patent was recorded (R. 30–33; 388, Pl. Ex. I–1, original).

13. *1863: The "Dyer" Survey.*—On March 4, 1863, Surveyor General Beale approved as correct a survey, apparently of the eastern shore of Mare Island Straits, the plat of which included a rough outline of the southern part of Mare Island proper (Pl. Ex. A, original; same Def. Ex. 12 and 14; see also 215, 391, 798–799). Except that the island is labeled, at the point here in dispute, as "Mare," and

an unbroken shore line is shown, the exhibit would seem to have no particular value. It was made from earlier surveys, including one by Dyer in 1862.

14. *1873: The "Sanger" Report.*—On November 19, 1873, a naval board of civil engineers, which had been formed "for the purpose of revising the plan of the yard" and given particular instructions (R. 482–485), made its report (R. 486–530). Noting the questions raised as to the title, they pointed out in their report the use and need for the marsh or tule land as well as the so-called highlands (R. 488, 510).

15. *1873: Protest of commandant to State authorities.*—Commandant Rodgers of the Mare Island Navy Yard, who had expended much time and labor in the investigation of claims to the title of the marsh or tule lands (R. 488–489) and had secured the opinion of the Solicitor of the Navy on the question (R. 546, 558), on November 24 and 25, 1873, wrote the Board of Supervisors of Solano County and the Register of the State Land Office, protesting hearings by the state authorities on proposals "to reclaim tule land appertaining to Mare Island" and notifying them formally of the claim and occupation by the United States (R. 800–801, 838–839).

16. *1877: Freeman survey.*—On July 19, 1877, United States Surveyor General Rollins for California instructed James E. Freeman, United

States Deputy Surveyor, to make a survey of Mare Island (R. 563–569, same 707–708), as required upon application by the confirmees of any Mexican grant (13 Stat. 334, Sec. 6; 14 Stat. 220, Sec. 8). Freeman completed his plat (R. 562½), notes and general description (R. 572–582, same 711–720) during the same month. Publication reciting the completion and return of the survey was made by Surveyor General Rollins in the fall of 1877, as required by law (R. 698, and see R. 392). Surveyor General Ames, who succeeded Rollins on October 17, 1877 (R. 749), transmitted to the Commissioner of the Land Office on November 5, 1877, the tracing and account of Freeman (R. 700–701, and see R. 393). On November 16, 1877, the Commissioner of the General Land Office authorized payment for Freeman's services (R. 732), which he would not have done had he not approved the survey made by Freeman (393). On January 18, 1878, Surveyor General Ames executed his certificate reciting the publication, completion, and return of the Freeman survey (R. 570–571, same 709–710), and on August 6, 1879, Surveyor General Wagner, who had succeeded Ames on June 25, 1878 (R. 749–750), did the same upon the original plat (Pl. Ex. S, at R. 562½)—which neither would have done had they not been "satisfied with the survey as made by Freeman" (R. 393–394).

It may be noted that at this time it was not the practice and it was unnecessary for the Commis-

sioner of the General Land Office to specifically note his approval of such surveys (R. 751; *Tubbs* v. *Wilhoit*, 138 U. S. 134, 142–143). It may also be noted that "the Freeman survey accords very well with the surveys of the Coast and Geodetic Survey" (R. 762). "The Coast and Geodetic Survey is a survey of the exterior boundary of the high water line of Mare Island; that is, the mean high water is what they seek to portray. The Freeman survey is a segregation by so-called meander lines primarily for the purpose of determining the area and acreage of land involved in the property" (R. 763).

Edwin H. Sawyer, a former employee in the Navy Yard at Mare Island, who was corresponding clerk in the office of the Surveyor General of the United States for California in 1879, acquired the claim to the lands in dispute (R. 633–637, 641–652, 847, 751, 897). On July 5 and July 16, 1879, Bernard T. Hanley of Washington, D. C., as "attorney for owners", protested the Freeman survey by letters to the Surveyor General for California and the Commissioner of the General Land Office (R. 583–593), long after the time within which such protests were required to be made and without disclosing the name of the real party in interest (R. 570–571, 13 Stat. 332; see also R. 395). On August 7, 1879, in complying with requests by the Commissioner of the Land Office for copies of documents relating to the Bissell and Aspinwall

proceedings and the Freeman survey (R. 593, 732–733, 750–751), Surveyor General Wagner stated that he considered "the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tideland, and should be limited to the area contained south" of the lands here in dispute (R. 593–594, also 702–703). It is suggested in the record that he probably had in mind this boundary "as a property line, but that would not have any influence on the geographical situation" (R. 459–463).

In connection with litigation hereafter mentioned, on September 9, 1905, the Secretary of the Navy requested the Secretary of the Interior to make a survey of the Island (R. 744–745). Land Office Commissioner Richards, however, determined on September 22, 1905, that the Land Office could not undertake the survey because the land involved "is not public land of the United States, the same having been purchased by the United States from private land claimants * * * and there is no appropriation available out of which the expense of surveying other than public lands of the United States and reservations or abandoned reservations, under the jurisdiction of this office, could be paid" (R. 735–747, same 534–541).

17. *1887: Bouldin* v. *Phelps and San Francisco Sav. Union v. Irwin.*—In *Bouldin* v. *Phelps,* decided in 1877 by the Circuit Court for California, other claimants under the Castro grant brought an

action in ejectment against the commandant of the Mare Island Navy Yard. In finding against the plaintiff, the court held that, since plaintiff's claim had not been presented to the Board of Land Commissioners and confirmed, it was insufficient upon which to base an action for ejectment, and that the plaintiffs were entitled to assert no right under the Bissell and Aspinwall decrees, particularly since the confirmation proceedings were still *sub judice* because of the unsigned decree therein. In its opinion the court said, "We might well stop here" but because the commandant had questioned the genuineness of the Castro grant, the court undertook to express the view that it was invalid (30 Fed. 547, 563–564).

In *San Francisco Sav. Union* v. *Irwin,* Mr. Justice Field on circuit held that the marsh lands north of the lands here in dispute were below ordinary high water mark and hence not a part of Mare Island. It should be noted that the United States was not a party to this proceeding, it did not involve the lands herein dispute (R. 836–837), and in part it dealt with lands in Napa County which are not, and which the United States has not claimed as, part of Mare Island. 28 Fed. 708, affirmed 136 U. S. 578.

18. *1912: Application of California for patent from United States.*—On September 16, 1914, the Commissioner of the Land Office rejected the application of California for a patent to the lands here involved, because "no segregation survey"

had been approved as required by law and because, as part of Mare Island under a confirmed Mexican grant, they were not subject to the Swamp Act (R. 543–551).

19. *1914: Sawyer* v. *Osterhaus.*—Sawyer, who had been clerk in the navy yard and in the Surveyor General's office, *supra,* brought an action in ejectment against the commandant of the Mare Island navy yard and, in 1914, the District Court for California held that, in the absence of legal title which under the Swamp Act could only be derived by segregation of lands as swamp in character and without a patent, Sawyer had no standing to bring the action. The court also stated that "the evidence further shows" that the Government had maintained its possession over the lands since the establishment of the navy yard. 212 Fed. 765.

20. *1915: Lightfoot report.*—In compliance with a writ of mandamus issued from the Supreme Court of the District of Columbia (R. 181), W. J. Lightfoot, a United States Surveyor, was instructed on January 6, 1915, to make an examination and investigation of the swamp and overflowed lands of Mare Island. In his report of the same year, he concluded that they were a part of the island (R. 596–620).

21. *1923: Joy survey.*—On January 27, 1921, United States Cadastral Engineer Francis E. Joy was instructed "to determine the lands properly belonging to Mare Island in 1850" (R. 622–623).

He reported on October 23, 1922 (R. 622–629), concluding that all the marsh lands bounded by navigable water were parts of the island (R. 626–627). His plat, as corrected in accordance with further special instructions, was accepted in November 1923 (R. 43, 630–632).

22. *1925: Determination of swamp character of lands.*—In response to a further writ of mandamus issued out of the Supreme Court for the District of Columbia, the Secretary of the Interior determined that the lands here in question were "Swamp and Overflowed Land" at the passage of the Swamp Act in 1850 and on January 10, 1925, notified the Secretary of the Navy that the Land Office had determined that the lands were of such character but reserved decision whether they should be patented to California in order that the Navy Department might be heard. On February 12, 1925, the Secretary of the Navy replied, reciting the whole history of the matter (R. 552–562).

23. *1928: Patent from United States to California.*—On March 9, 1928, a patent of the United States was issued to California in compliance with a peremptory writ of mandamus from the Court of Appeals for the District of Columbia (R. 33–42), that Court stating in its opinion that "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises." *Work* v. *United States,* 23 F. (2d) 136, 138.

24. *1930: Present suit filed.*—Finally, the United States instituted this suit in November, 1930, to

quiet title to the tract of land involved in State Survey No. 34. The District Court for the Northern District of California was asked to cancel both the patent issued by the United States to California in 1928, as a result of the mandamus proceedings, and the patent issued to Darlington in 1857 (Complaint, R. 2–43; amended 98, 126, 632).

I

THE CASTRO GRANT INCLUDED THE LANDS IN CONTROVERSY

Although the question was determined adversely to them by both courts below, respondents, without filing a cross-petition for certiorari, apparently seek to support the decree of the Circuit Court of Appeals by asking this Court to find as a fact that the lands in controversy are not a part of Mare Island (Br. pp. 31–45). The question thus raised is based upon a theory of law not heretofore advanced, and may be stated as follows:

> Whether it may now be successfully claimed that under the ancient Mexican law the marsh lands contiguous to the highlands were not a part of Mare Island and therefore were not conveyed to the United States under the Castro grant—even though (1) both courts below have found that the lands are part of the island; (2) the uncontradicted evidence shows that the whole area of both tule and uplands is surrounded by navigable and flowing water, and presents a continuous, unbroken shore line; (3) the

lands involved rise to an elevation well above the mean highest tide; (4) the grant confirmed in the 1850's was for "Mare Island . . . bounded by the water's edge" or "with its natural boundaries"; and (5) the tule lands have always been claimed as part of the island.

Whether the lands were part of Mare Island was the principal issue at the trial, about three-fourths of the record being devoted to it, and the trial court made comprehensive findings upon which the question was determined adversely to respondents (R. 162, 164, 167, 168, 170, 173, 175, 178, 182, 185, 191, 195, 196, 197, 199). Respondents also fail to note that on appeal, the court below concurred in the trial court's findings, it being stated in the opinion (R. 967) that "the lands are a part of Mare Island, northwesterly of the main plant of the Mare Island Navy Yard."

Respondents now ask this Court to review 1,000 pages of record and a great number of original exhibits (consisting mostly of maps, charts, surveys, and documents of various types) and to conclude therefrom that the conclusion reached by the courts below is "plainly erroneous or unsupported by the evidence." *Virginian Ry.* v. *Federation,* 300 U. S. 515, 542; *Alabama Power Company* v. *Ickes* (Nos. 84 and 85, October Term, 1937. Decided January 3, 1938.)

That the findings below are amply supported by the evidence of record is clear. To show that the

lands here involved had always been a part of Mare Island, the Government introduced more than forty maps and charts, dated from 1775 to the time of trial, showing that the site was in fact an island and that the lands here in dispute were not separated from the highlands by a waterway of any kind. Despite respondents' assertion to the contrary (Resp. br. 32), some of the maps dated between 1775 and 1850 show the site as an island (1775, Pl. Ex. L–1, R. 397, 478; Spanish map, undated, Pl. Ex. L–3, R. 398–399, 478; 1825, Pl. Ex. L–5, R. 479; 1848, Pl. Ex. L–8–A, R. 404; 1850, Pl. Ex. L–11, R. 406–407).

All of them, with the single exception of the official state map of California of 1854 which was obviously and admittedly "a broad burlesque upon the topography of California" (R. 890; see also 862–892), show an unbroken shore line from Napa River to Sonoma Creek along San Pablo Bay—thus eliminating the possibility of a waterway separating the lands here involved from the "uplands" which are admittedly part of Mare Island. (R. 435–436; 397; 397–398, see origin' Pl. Ex. L–2; 399; 400; 401; 402; 403; 404; 405; 760, see original Pl. Ex. L–8–C; 406; 406–407; 408; 409; 410; 411–412; 413–414, see original Pl. Ex. L–17; 418; 419; 421, 424–425; 427; 427–428; 428–429; 429–430; 431; 432; 433–434; 435; 449–450, see original Pl. Ex. L–31; 761, see originals of Pl. Exs. L–32, L–33, L–34, L–36, L–37, L–38; 834–836, see original Pl. Ex. 00; 846–847, see original Pl. Ex. TT; 790–792, see

original Pl. Ex. JJ; 792–793, see original Pl. Ex. KK). The even and crescent-shaped shore line of San Pablo Bay, which is the south or western boundary of Mare Island, has come to "a state of balance or equilibrium between eroding and upbuilding forces" (R. 435–436).

Counsel for the defendants below, after the sixth government map had been introduced, offered "to stipulate that the government can produce a hundred additional maps of similar character * * * Spanish maps, English maps, and French maps * * * showing an unbroken shore line from Carquinez Straits to Sonoma Creek" (R. 401). At two points in the record, however, they submitted for identification or introduced several drawings or sketches of the Navy Yard (dated from 1886 to 1925) upon which they sought to show notations of tide lines across the isthmus connecting the "uplands" with the main body of marsh, but in each case an inspection of the original indicates that these drawings do not bear any such construction. (R. 451, 467, 468, 763; 451–452, 468, 764–765; 452, 454–455, 471, 474–475, 790; 453, 473–474, 787; 455–456; 456; 456–457.) Many of the maps, of course, including those introduced by the Government, have lines indicating the boundary at the isthmus between upland and tule (see, for example, R. 430–432, 415–418, 450).

Testimony in connection with the maps deals with definitions of upland (R. 789), waterway (R. 439, 441, 448), tule (R. 441, 450–451, 463–464),

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marsh (R. 433, 445), and tides (R. 440, 449, 793, 794, 796, 802, 806). Some of the maps after 1915 carry designations of the tract of tule as "Island No. 1" and the uplands as "Mare Island," but it was shown that this was merely a method of identification which has since been discontinued and which did not indicate non-contiguous land (R. 434, 442, 443, 444, 446, 463, 464, 560, 628, 760).

The isthmus connecting the uplands with the large tract of tule or marsh was shown to be in part originally a "sand shell ridge," since depleted by removal of sand for construction uses (R. 766, 767, 772–773, 782, 811). These barrier ridges or dunes were constantly built up by wind and wave action (R. 818, 832–833). If they had not been "high enough to withstand the action of the waves," they "would be all swept away" (R. 833). Even in recent years these ridges are still "about waist high" (R. 837). The "*lowest possible* elevation of the low and tule land" area of the isthmus "east of the Sand Ridge or Barrier" in 1852 was ".67 of a foot above mean or ordinary high water" (R. 815, italics supplied). It should also be noted that the building of dykes and reclamation of the land "prevents any increment" and "also causes a settling of the soil by evaporation." Plowing and other operations also deplete the surface (R. 797, 817, 849–850).

All of this evidence conclusively shows that there is and always has been a continuous unbroken *mean*

high tide shore line all around the Island from the Straits of Carquinez on the south, to Mare Island Straits and Napa River on the east, through Navy Yard Slough to Sonoma Creek on the north, and to San Pablo Bay on the west. In short, the testimony shows that under every common law concept there has always been only one island, Mare Island, and that its northern boundary is far north of the lands here involved.

Respondents now seek to overcome this evidence by asking for the first time (Br. 31–37) that judicial notice be taken of provisions in the ancient Mexican law which, they claim, limit the extent of the Castro grant to a grant of the uplands from the point annually reached by the *highest* high tide. From this, it is then argued that the evidence shows that the lands in controversy "were entirely below the line of the highest regular tide" (Br. 32) and, therefore, were not included in the description of the grant to Castro.

It is the position of the Government that (1) this contention is not properly raised at this stage of the proceedings; but should the Court determine to consider it, the argument is untenable for three reasons: (2) the facts upon which it is predicated are contrary to the facts found in the record; (3) nothing in the Mexican law requires a different conclusion from that reached by the courts below; (4) the decrees of confirmation, followed by the Freeman Survey, are conclusive and must be construed according to the common law.

1. *Respondents are not in a position to raise this new contention.*—As has been indicated, respondents have not filed a cross-petition for a writ of certiorari in this Court to review the findings made by the two courts below that the lands in controversy are a part of Mare Island. They must also admit that the question of Mexican law relative to tide water boundaries, which respondents now raise, was not raised either in the trial court or before the Circuit Court of Appeals.

Under these circumstances, it is submitted, respondents are not now in a position to raise this contention before this Court. While it is undoubtedly true that this Court has the power to consider objections to rulings adverse to the respondents even in the absence of a cross-petition (*Langnes* v. *Green*, 282 U. S. 531, 537–538), the Court will not consider contentions not raised in either court below except in exceptional circumstances even though the argument offered be in support of the decree. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498; *Prudence Co.* v. *Fidelity Co.*, 297 U. S. 198, 208; *Zellerbach Co.* v. *Helvering*, 293 U. S. 172, 182; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 389, p. 787. It is equally well recognized, throughout a long line of decisions in this Court, that it is incumbent upon respondents in such a case to persuade the Court that it should entertain the novel contention. As was said in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 88,

"If the power exists, respondent has not persuaded us that our discretion should be moved to use it."

Obviously, respondents can advance no persuasive reason to justify a departure from the general rule in the present case. As is stressed throughout other portions of respondents' brief, the question of the ownership of swamp lands on Mare Island has been before the courts a number of times, beginning with *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708, decided on July 8, 1886. In none of these cases was the contention, here advanced by respondents, raised. Again, as has been pointed out, the principal issue at the trial of this cause was the extent of the lands owned by the United States. Both parties at the trial assumed that the common law rule prevailed that a grant of riparian lands extended to the mean high water mark (*Borax, Ltd.*, v. *Los Angeles*, 296 U. S. 10, 22). Accordingly, voluminous testimony was introduced, and both parties made their proof on the basis of that doctrine. Hence, it is clear that the injection of the contention at this stage, without any explanation, comes as a wishful afterthought, and manifestly there is no reason why the Court should entertain it.

2. *The annual highest high tide did not reach across the northern end of the highlands.*—However, if the Court determines to consider respondents' contention, it is the position of the Govern-

ment that the facts upon which it is predicated have no basis in the record.

Respondents' entire argument is bottomed upon the factual assertion (Br. pp. 31–32) that "the evidence all agrees, . . . that they [the lands in controversy] were overflowed by the tides several times a month (R. 803–805, 815), and were entirely below the line of highest regular high tide (R. 622–627, 729, Pltff's. Ex. KK, original)." By the "line of the highest regular high tide" respondents mean "the line reached by the highest tide during the year" (Br. 33).

The Court's attention is respectfully directed to Plaintiff's Exhibit NN (R. 530½) prepared under the direction of Captain Carl A. Carlson, Captain in the Civil Engineering Corps, United States Navy (R. 762), and to his explanation thereof (R. 815–828). This exhibit consists of a plat of cross-sections of the land in controversy, made from actual surveys in 1856, 1906, 1917, and 1931, which shows the profiles of the land and tides for each of these years according to the "usual engineering method" (R. 807). Attention is particularly directed to the second profile from the bottom on the exhibit, designated as "Station 60," which corresponds to the southern boundary of the lands claimed by respondents (R. 809). Following the heavy black line, which is drawn to indicate the elevation of the land at this Station in 1852 (see explanatory notes "Re-Station 60" at lower

right of the exhibit), the Court will readily see that the land in this section was at that time, and is now, well above the spring high tide, or, to use respondents' language (Br. p. 33), "the highest tide during the year."[2] This evidence, uncontradicted and undisputed by respondents, conclusively proves exactly the opposite of their assertion that "at several times a month . . . the tides reached to the bank at the northern end of Mare Island [as they describe it] which was the dividing line between the uplands owned by the United States and the swamp lands to which respondents hold title" (Br. p. 34).

Further reference to the other stations shown on this exhibit definitely proves that all of the land here in controversy is well above the "line of the regular highest high tide" upon which respondents rely. It is true, as shown by the enlarged section on Station 2, redrawn to a larger scale at the bottom of the exhibit, that the storms of December 1914 and 1921 caused the tide to rise three feet above the mean high water mark or about one-tenth of a foot above the so-called boundary land at Station 60, but such tides are far higher than the "highest regular high tide during the year." Furthermore, if such extreme storm tides be the

[2] For an explanation of the various tides, see testimony of Captain Carlson in the instant case, R. 793–797, and the opinion of this Court in *Borax, Ltd.*, v. *Los Angeles*, 296 U. S. 10, 23.

criterion by which boundaries may now be determined, titles to land along the whole west coast of California and along both coasts of Florida rest on extremely tenuous grounds.

It is to evidence of such sporadic storms that respondents point in their record references (Br. 31–32), but clearly such testimony falls far short of establishing a basis for the doctrine they assert, i. e., the highest regular high tide during the year. As Captain Carlson said, the extraordinary high storm tides arise "but once in ten years" (R. 792). Respondents particularly rely (Br. 31) upon three plates introduced in evidence by the Government (R. 802–805), showing the tidal regimen for November 1929 and for February and June 1905, which indicate that the tides rose as much as a foot above *mean* high water mark during those months. It is clear that these plates completely harmonize and corroborate Plaintiff's Exhibit NN, since each of them shows that during these specimen months the tides did not rise to the elevation of the land shown on that exhibit. They squarely disprove the contention that the lands here involved were inundated by the tides several times a month.

Nor is there anything in the "surrounding circumstances" to which respondents point that proves that Mare Island consisted of no more than the highlands (Br. p. 35). It is abundantly shown that the whole body of tule land has uniformly been treated and claimed as part of Mare Island—in the

grant Castro claimed (Mare Island "in all its extent", R. 19, also 250, 560), the Sloat Board[1] correspondence (Mare Island "with all its appendages," R. 324, "a large tract of tule extending toward Napa and Sonoma," R. 325, see also 842–844), the negotiations with Bissell who wanted five times as much per acre for upland as for "the main body of the tule or low ground" (R. 368, 369), in the contract with and deed to the United States (Mare Island "including all the tule or lowland, and marsh, belonging to the same, or which has ever been reputed or claimed to belong to the same", R. 296, 313, 780, 781) and bond ("Mare Island and its appurtenances", R. 310), the selection and reservation as a navy yard (Mare Island "and its appendages of Tule or Marsh land ordinarily reputed to belong to said island", R. 381), the report of the Sanger Board (R. 486, 488, 489, 510), the pro-

[1] Respondents attempt to infer from statements made in the Sloat Board Report that the Board was of the opinion that the lands in the instant case were not a part of Mare Island (Br. p. 36). However, it is clear from the Board's letter to the Secretary of the Navy, written a month later, that the Board found the Island to contain "about nine hundred acres *in addition to a large tract of tule extending toward Napa and Sonoma.*" (R. 825. Italics supplied.) They also (Br. 6, 36, 83) assert that the Sloat Board "surveys" limit the island to the uplands, but the drawings accompanying the report of the Board (Pl. Ex. G, original) do not purport to include the whole island—they are merely a proposed plan of the structures and a sketch of the topography of the area covered thereby and, moreover, they show at least part of the isthmus here in dispute.

tests of the commandant in 1873 to state authorities (R. 800–801), the Freeman Survey (R. 562½), the report of the United States Surveyor General for California for 1883–1884 (R. 531), the rejection of California's application for a patent (R. 550), in *Sawyer* v. *Osterhaus* (R. 560–561, 599–600), the Lightfoot Report (R. 602), and the Joy Survey (R. 626–627.) Moreover, California's act of session, *infra,* p. 41–43, by limiting its grant of tidelands on the eastern shore of the island to "a parallel intersecting the northern point of the highlands" recognized that the island extended north and west beyond the lands here in dispute.

Typical of respondents' struggle to overcome the overwhelming facts of record is their attempt to limit the boundaries by bits from the record relating to area. References to "half a league" they compare with "half a league *square*" (Resp. Br. 11, 35, 40, 41), which is only a quarter of a league. But a Spanish land league used in California surveys was a measure of area, not distance (Webster's Unabridged Dictionary, 1935), and, according to the very case respondents cite (*United States* v. *Perot,* 98 U. S. 428, 432; br. 35), contains 4,340.278 acres. "Half a league" would then be 2,170.139 acres rather than 1,085 acres. Thus, "half a league" is not "surprisingly close" (Br. 35) to respondents' contention that the area of the island is 897 acres. Any doubt that remains may be

put at rest by a reference to Vallejo's testimony that the island "contains" about half a league (R. 238), which could only mean the league as a measure of area.

3. *Findings of the courts below are not erroneous under Mexican law.*—It is the further position of the Government that the provision of the Mexican law relied upon by respondents, to the effect that the boundary of the seashore is the line reached by the highest tide during the year (Br. p. 33), is not inconsistent with the findings of the trial court that the Castro grant conveyed all the land to the mean high water mark. The whole section of the Code provision, in force at the time of the grant, which respondents cite (Br. p. 33) is as follows (Las Siete Partidas, Part III, Title 28, Law 4):

> Every man can build a house or a hut on the sea shore which he can use whenever he wishes; and any person can erect there another edifice for his own benefit, provided the common custom of the people is not violated; and he can construct galleys and any other kind of ships and dry nets there and make new ones if he desires to do so; and so long as he is working there or is present no one else should molest him so that he cannot use and be benefited by all these things, and by others like them, in the manner aforesaid; *and all that ground is designated the shore of the sea which is covered with the water of the latter at high*

tide during the whole year, whether in winter or in summer. [Italics supplied.]

Certainly there is nothing in this section which precluded the court from finding that the grant conveyed the lands to the ordinary high water mark, perhaps with the right of the public to use the fore shore. Mexico, through its authorities, could grant even the seashore. *Cf. Jover* v. *Insular Government,* 221 U. S. 623; *United States* v. *Coronado Beach Co.,* 255 U. S. 472. Moreover, there is no evidence in the record to show that any of the lands here involved were, as required by the Code provision cited, "covered with the water of the [sea] at high tide during the whole year."

Moreover, the grant from Governor Alvarado to Castro conveyed the whole of Mare Island "in all its extent" (R. 251), and it is clear that the definition of an island under the Civil Law is the same as that accepted by the courts of this country, *i. e.,* a body of land entirely surrounded by a natural and constant flow of water—and the mere fact that the land may be surrounded by water occasionally or at high tide does not make it an island. *McBride* v. *Steinweden,* 72 Kan. 508, 515 (1906); *State* v. *Barco,* 150 N. C. 792, 797 (1909); *Payne* v. *Hall,* 192 Iowa 780, 789 (1921); *Zeller* v. *American International Corporation,* 292 Fed. 822 (C. C. A. 3). In the Civil Law an island is defined as "a certain portion of land entirely surrounded by the waters

of the sea or of a river."[4] See, Partida III, Title 28, Laws XXVII–XXX (Scott's Translation, 1931). Hence it is submitted, that when Governor Alvarado granted to Victor Castro the whole of Mare Island "in all its extent" he granted an island surrounded by a continuous flow of water and not by a sporadic high tide or storm spray, as respondents contend.

4. *The decrees of confirmation, construed by the common law, conclusively establish the extent of petitioner's title.*—It is the position of the Government that the decrees rendered by the Board of Land Commissioners and the District Court on appeal conclusively established the title of Bissell and Aspinwall, petitioner's grantors, to "Mare Island . . . being an island . . . bounded by the water's edge" (R. 780) or "with its natural boundaries" (R. 286, 290), *i. e.*, the mean or ordinary high water mark.

The Board of Land Commissioners had before it a petition in which title to the whole of Mare Island "in all its extent" was sought to be confirmed (R. 220, 250–251). It was the duty of that Board to "ascertain and settle" the extent of that title, pursuant to "the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and cus-

[4] "ISLA. Cierta porcion de tierra rodeada enteramente de agua por de mar ó por algun rio." Dictionario Razonado de Legislacion y Jurisprudencia. Por Don Joaquin Escriche (Magistrado Honorario de la Audencia de Madrid). Nueva Edicion (Paris, Mexico, 1925), p. 934.

toms of the government from which the claim is derived" (Act of March 3, 1851, c. 41, § 11, 9 Stat. 631). It must be presumed that in the performance of that duty the Board took judicial notice of the "highest high tide" doctrine of the Mexican law, as well as the Civil Law definition of an island, and having done so, determined that the grant extended to the "water's edge." Therefore, conceding the correctness of respondents' contention (Br. pp. 37–45) that confirmatory decrees could not enlarge or initiate a title to land, it is submitted that under the decisions of this Court the words "water's edge" or "natural boundaries", found in the decrees in the *Bissell and Aspinwall* case, must be construed to mean the ordinary high water mark. To quote from respondents' most favored case, *San Francisco Sav. Union* v. *Irwin,* 28 Fed. 708, aff'd. 136 U. S. 578, involving other lands on Mare Island, Mr. Justice Field said (28 Fed. 713):

> By the common law—*and by that law must decrees written in the English language be interpreted*—the boundary of the island, so far as its ownership as private property is concerned, is determined by *ordinary* high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark, over which the *daily* tides ebb and flow. *United States* v. *Pacheco,* 2 Wall. 589. [Italics supplied.]

In *United States* v. *Pacheco,* 2 Wall. 587, the district court had confirmed the survey and location

of a floating Mexican grant for three square leagues of land, situated on the east side of the Bay of San Francisco. The decree described the land as bounded "on the west by the Bay of San Francisco." The survey embraced marsh land covered by the monthly tides, but excluded lands covered by the daily tides. From the decree approving this survey the United States took an appeal to the Supreme Court in the interest of the settlers on the upland, who desired to have the floating grant so located that the bay, as a boundary, would be the line of low-water mark, thereby including in the grant marsh lands covered by the daily tides, and excluding an equal amount of upland. Mr. Justice Field, delivering the opinion of the court, said (pp. 589–590):

> The decree of the District Court confirms the claim of the respondents to the extent of three square leagues, and describes the land as bounded * * * on the west by the Bay of San Francisco. * * * On the side of the bay there are about two leagues of salt or marsh land. The whole of this land is covered by the monthly tides at the new and full moon, and a part of the land is covered by the daily tides. And the objection taken to the survey approved by the District Court is that it does not include this marsh land as part of the tract confirmed. The objection is made on the supposition that the lines given by the decree do not close; that a fourth line is necessary to com-

> plete the boundaries, and that this fourth line must be determined by the quantity confirmed, and so drawn as to include it; and that by the bay as a boundary in this case is meant the line of low-water mark. * * * By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails. 3 Kent, Comm. 427. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican Government, the result will be equally against the position of the appellants.

The *Pacheco* case has been followed in *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 22–23; *Shively* v. *Bowlby,* 152 U. S. 1, 29; *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 506 (C. C. A. 1); *Coburn* v. *San Mateo County,* 75 Fed. 520 (C. C. N. D. Cal.). Cf. *More* v. *Massini,* 37 Cal. 432 (1869). See also, *San Francisco* v. *LeRoy,* 138 U. S. 656, 670, 672.

It therefore follows that the decrees of the Board of Land Commissioners and of the District Court, on appeal, are a complete answer to respondents' argument. Moreover, pursuant to these decrees,

and as required by Section 13 of the Mexican Claims Act, as amended by Section 1 of the Act of July 1, 1864 (ch. 194, 13 Stat. 332), an official survey was made of the land so confirmed, known as the Freeman Survey (R. 562–594), by which the boundaries of the Island were conclusively[5] determined to be "the water's edge at ordinary high water mark" (R. 575), and the Island found to contain an area of $5227^{22}/_{100}$ acres (R. 579).

Although it was received in evidence without objection on their part (R. 562), respondents would now attack the validity of the Freeman Survey (*supra*, pp. 11–14) on the ground that it was not shown that the Commissioner of the General Land Office had endorsed a certificate of approval thereon, as provided in Section 1 of the Act of July 1, 1864 (Br. p. 43). This section provides for the endorsement on the survey of a certificate of approval by the Commissioner of the General Land Office only when objections are made to the survey within 90 days after its publication. In the instant case, as the trial court found, no objections were made to the survey within the statutory period.[6] And thereupon, as required by the statute, the Surveyor General, after approving it, forwarded the survey to the Commissioner of the General Land

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[5] *Knight* v. *U. S. Land Ass'n*, 142 U. S. 161, 182, 205–206; *United States* v. *Hancock*, 133 U. S. 193, 197; *Cragin* v. *Powell*, 128 U. S. 691, 699; *Tubbs* v. *Wilhoit*, 138 U. S. 134.

[6] See Footnote No. 12, page 28, Brief for the United States.

Office (R. 167–168). It is clear, therefore, that the provision of the statute relied upon was fully satisfied in the instant case.

Furthermore, it will be noted that none of the cases cited by respondents (Br. p. 43) discuss the question of what constitutes an approval by the Commissioner, nor do any of them hold that the Commissioner's approval must be indicated by endorsing on the survey a certificate of approval. On the contrary, the opinion of this Court in *Tubbs* v. *Wilhoit*, 138 U. S. 134, which respondents attempt to distinguish on the ground that the statutes were dissimilar, is on all fours with the question here presented. In that case the Court held, per Field, J., that although the Act of July 23, 1866 (14 Stat. 219, c. 219, § 4) provided that "it shall be the duty of the commissioner of the general land office to certify * * * approved plats," the duty imposed was ministerial, and that a plat of swamp lands prepared according to law, certified by the Surveyor General for California, copies of which were filed in both the General Land Office and the local land office, was sufficient upon which to base a patent, despite the failure of the Commissioner to endorse his approval thereon.

In the instant case the trial court made the following finding of fact with respect to the approval of the survey (R. 167–168):

> In July, 1877 the Surveyor General of California in compliance with the 13th section of the Act entitled "An Act to ascertain

and settle the private land claims in the State of California," approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave due notice that same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to wit, "The Alta California" and one published near the Land Surveyor, "The Vallejo Evening Chronicle", published in the City of Vallejo, County of Solano, State of California, and retained in his office for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to said survey and the said Surveyor General of California duly approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval. Thereafter the Commissioner of the General Land Office duly approved said survey and plat and caused the same to be filed in a jacket called "The Mare Island Jacket" in the file of military reservations in the General Land Office; thereafter on September 22, 1905, the Commissioner of the General Land Office expressly approved, used, and acted on said survey and plat and thereafter, on September 28, 1905, the Secretary of the Interior expressly approved and concurred in said action of the Commissioner

of the General Land Office, and approved, used, and acted on said survey and plat.

There is ample evidence to support the finding (R. 562–594, 698–751), and the facts so found come squarely within the rule of *Tubbs* v. *Wilhoit, supra.*

It is therefore submitted that the decrees of confirmation and the official survey made pursuant thereto and as required by law, conclusively established that the boundaries of Mare Island extend to the ordinary high water mark, and that the ancient Mexican doctrine relied upon by respondents is wholly irrelevant.

II

THE DECREES OF THE BOARD OF LAND COMMISSIONERS AND OF THE DISTRICT COURT ARE CONCLUSIVE UPON RESPONDENTS

Respondents have not met squarely the various reasons advanced by the Government for holding the decrees in *Bissell and Aspinwall* v. *United States* conclusive on them. They have persisted in assuming that the decree of the District Court was ineffective when given and ordered to be entered in 1857, because not signed by the judge. They apparently rely entirely upon a dictum in *Bouldin* v. *Phelps,* 30 Fed. 547, and the decision of the court below. By treating the decree as ineffective until 1930, when the *nunc pro tunc* decree was entered, they seek to avoid the effect of their laches. But the matter has been settled by the controlling cases cited in the Government's brief, pp. 35–39.

They have abandoned the position taken by the court below that California was a third party under the statute (Br., pp. 46–47) and in portions of their brief seem unwilling to take its position that the Government was guilty of "intentional fraud" (Br., p. 64) although elsewhere they argue that the proceedings were not conclusive on them because the suit "was fictitious and collusive" (Br., p. 47). They seem also to weaken on the proposition that the United States was a trustee "in the strict sense" (Br. 69) though seeking still to be treated as cestuis. The cases which they cite are all cases in which the point of trusteeship is not involved. They are cases in which the entire beneficial interest is in the grantees and the Government is said to be a trustee in the same loose way that a vendor is often said to be a trustee for his vendee; or a mortgagee, a trustee for his mortgagor. Respondents do not refute the rule that as a cestui California (and its successors) would be bound by the decree if it acquiesced or participated in the proceedings, nor the rule that as a cestui it and its successors might be barred by laches.

1. *California acquiesced in the decrees.*—The only answer made to the Government's showing of acquiescence on the part of California (Brief for the United States, 51–52, 58–60) is that the California legislature failed to include the land in question in its cession of lands to the United States. But California consented to the "purchase" of Mare Island and in the consenting act indicated its

cooperation with the Federal Government with respect to the proceedings which were then pending before the Land Board (Brief for the United States, 51–52, 58–60). California thus knew that the United States had taken a conveyance, which included the swamp lands as part of Mare Island.

Ignoring the consent to the purchase of the entire island, respondents point to another portion of the California Act of 1854 granting to the United States the "overflowed beach or swamp land on the eastern shore" of the Island (Calif. Stats., 1854–1855, pp. 48–49, Sec. 2), and upon that provision insist that California did not only fail to consent "to the loss of her rights in the land in controversy" but also thereby intended to retain its title to all other lands (Br. pp. 8–9, 59, 69, 82). However, in addition to ignoring the first section, respondents misunderstand the nature and purpose of the second section of the California Act of 1854. It is clear from the opinion of Attorney General Cushing (8 Op. A. G. pp. 422–427) and the California Senate Journal (1854, p. 37 and Appendix Document No. 4) that California was asked to cede and intended to cede tidelands, rather than marsh lands above mean high water mark. In other words, before a Navy yard could be constructed, it was necessary that the United States have title to the tidelands *below* mean high water mark, upon which the principal Navy yard wharves, docks and structures were to front. In short, a third type of lands is here in-

volved—the tidelands, as distinguished from marsh or uplands. Such tidelands would belong to the state, whether the Castro grant were valid or not (8 Op. A. G. at 425), since it is not claimed that the grant extended beyond ordinary high water mark.

While Attorney General Cushing, in his opinion (8 Op. A. G. at pp. 425–426), referred to, and perhaps was not entirely clear as to the effect of, the newly enacted Swamp Act, he was concerned with land "all below high water mark" or "tide water shore land." He mentioned the Swamp Act only as it referred to "other overflowed" land and, in his opinion, italicized these quoted words (8 Op. A. G. at 426). On the indispensable need of title to the tidelands, he concluded rhetorically:

> Nay! how can the United States enjoy the use of Mare Island as a Navy Depot, while its entire shore belongs to California, whose rights of property may shut up the Island against all access of ships as effectually as if it were surrounded by a wall of granite.

Obviously he was referring to tidelands adjoining the uplands, as well as those tidelands adjoining the tule lands. California complied by ceding "*overflowed* beach or swamp lands"—in its statute thus referring to both types of lands mentioned by Cushing in his opinion, in its eagerness to secure the naval station upon its shores. California has since granted to the United States the remaining tidelands (California Statutes, 1897, pp. 74–75).

In this connection, respondents may have been misled by the loose use of phrases in the main brief for the United States. There, the phrase "other swamp lands" in the nineteenth and twentieth lines on page eight should be "tide lands"; the phrase "similar swamp lands" in the twenty-fourth line on page forty-six should be "tide lands"; and the phrase "other swamp lands" in the twenty-first and twenty-second lines on page fifty-one should be "tide lands."

Moreover, that both California and respondents' predecessors acquiesced in the decrees is irrefutably shown by the failure of either of them to protest against the approval of the Freeman Survey until long after the statutory period for filing such protests had expired.[7]

That California has always believed that these lands in question had passed to the United States is shown by the fact that no tax had ever been assessed to anyone upon these lands (R. 477),[8] despite the patent to Darlington in 1857. The State would have levied such a tax had it considered the lands to be in private ownership.

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[7] See, pp. 11–14, 36–39, *supra*, and Brief for the United States, pp. 28–29.

[8] There is an indication in the record that, after the issuance of the patent to California in 1928 as a result of *Work* v. *United States*, the heirs of Sawyer paid taxes for 1873, with interest (R. 646–648), but the County Assessor's records show no evidence of this certificate of redemption from tax sale (R. 477).

Taking all these things into consideration, it becomes apparent that California acquiesced in the litigation and the successors of California should be estopped from assailing the conclusiveness of the decrees.

2. *Respondents are barred by laches.*—Assuming, however, that California was a cestui and did not acquiesce in the proceedings and was wronged thereby, the State and respondents are barred by laches. Respondents in their brief fail to rebut the Government's showing of laches (Brief for the United States, pp. 60–65). It it clear that despite the fact that California was perfectly aware of the proceedings with respect to these lands in 1854, no legal steps of any sort were taken by it or any of respondent's predecessors to assert rights until 1905 (Br. p. 72).

Respondents' statements (Br. 70–73) as to their activities and the activities of the Government must be subjected to the same corrections to which attention has been called by the Government in that portion of this brief, *infra,* dealing with adverse possession. It is also to be borne in mind that the period of laches might bar relief considerably short of the period of a statute of limitations and the period would begin to run even prior to taking possession of the land. Respondents' right to attack the conclusiveness of these decrees was barred by laches long prior to 1905.

3. *The adversary nature of the proceedings.*—To refute the Government's contention that the proceedings before the Land Board are conclusive, even granted that they were nonadversary, respondents have been forced to rely on general language found in some cases in which the point was not involved (Br. 50 *et seq.*). This language is to the effect that proceedings before the Board were judicial in character. In addition they appear to rely particularly on *United States* v. *Throckmorton,* 98 U. S. 61, a case denying the Government the right to set aside a confirmation decree alleged to have been obtained by fraud. In that case this Court made a statement recognizing that decrees might be set aside in cases where the unsuccessful party had been prevented from fully exhibiting his case, by fraud or deception practiced on him by his opponent. It is difficult to derive from that case the rule that proceedings before the Land Board must be adversary in character.

The one other case on which respondents rely is *The United States* v. *Ritchie,* 17 How. (58 U. S.) 524. That case, clearly indicating that the Land Board was an administrative tribunal, held that, upon what is called an appeal from the Board, the District Court hears the case *de novo.* But even though adversaries be necessary before the reviewing tribunal, it does not follow that they are necessary before the tribunal below. As has been pointed out in the Government's main brief (p. 68), the

decree below need not fall because a review would not be possible in the particular case by reason of the non-adversary character of the proceedings.

Nor do the long list of cases on which the respondents rely in support of their contention that the proceedings before the District Court were a nullity cover the situation which existed in *Bissell and Aspinwall* v. *United States*. In none of them were the parties to the proceedings interested in opposite results being reached in proceedings conducted in the utmost good faith.

No further discussion seems necessary in reply to the portion of respondents' brief dealing with the conclusiveness of the decrees since it is believed that nothing appears therein to shake the position of the Government set forth in its main brief that California was not a third party under the statute; that adversary proceedings were not necessary before the Board of Land Commissioners, and that its decree would be binding on the respondents even assuming that the decree of the District Court should fail; that the requirements of adversary proceedings were satisfied both before the Land Board and the District Court, before which tribunals the Government proceeded in the utmost good faith and with an utter absence of fraud on its part or collusion with Bissell and Aspinwall; that in these proceedings the United States was not a trustee for California; that even if it was, the acquiescence of California in these proceedings would estop it and respondents from attacking the

decree; and that in any event the respondents would now be barred by laches from assailing the decree of the District Court which became effective in 1857.

III

THE UNITED STATES HAS ACQUIRED TITLE BY ADVERSE POSSESSION

Unable to contradict the evidence in the record upon which the trial court found that the Government has acquired title to the lands in question by adverse possession, respondents nevertheless purport to deny the validity of that title, (1) by an attack upon the presiding District Judge; (2) by factual assertions that do not accurately reflect the record; (3) by an attempt to impeach the probity of a principal witness for the Government; (4) by a contention that the United States could not acquire title by adverse possession against the respondents until it had issued a patent to them.

1. *The findings of the trial court.*—In an attempt to avoid the force of the findings of fact made by the trial court to the effect that the Government has been in adverse possession of the premises since 1853, respondents seek to discredit them by an attack upon the supposed state of mind of the trial judge when he made the findings (Br. 79–81). It is the position of the Government that respondents' attack is improper and unwarranted.

The record in the instant case abundantly demonstrates that Judge St. Sure presided over a long and difficult trial with interest, complete fairness to both parties, and an unusual degree of patience.

Upon the conclusion of all the testimony, the case was submitted to him on elaborate briefs by both sides (R. 905). The court held the matter under advisement for more than a year and a half before rendering a decree (R. 162, 202–206). At the same time there was pending before him another cause involving a much larger tract of adjoining lands in which most of the principal issues were identical with the instant case.* Proceeding as he did with such care and caution, and fully aware of the great importance of the litigation before him, there is no basis for respondents' assertion (Br. p. 80) that "the District Judge very apparently made up his mind that the Government was right and signed the Findings presented to him without comparison with the evidence."

More specifically, the Court's attention is directed to the imputation which respondents would draw from the assertion that the Findings are "word for word" a verbatim repetition of the pleadings. Without quibbling over the matter, the correctness of this assertion may well be questioned "if this Court will compare the Findings of Fact word for word" with the pleadings as respondents suggest (Br. p. 80).

The members of this Court are thoroughly familiar with the usual practice on the submission of findings. Moreover, it is clear from an examination of the findings made that the trial judge is to be

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* *United States* v. *Stewart*, Equity 2685–S D. C. N. D. Cal.

commended for their clearness, completeness, and accuracy. With reference to Finding No. VIII in which the court found that the Government has been in possession of the premises since 1853 (R. 171), petitioner disputes the assertion that it exhibits "an incorrect allegation made in the bill of complaint" which "has crept into the findings" (Br. p. 79). The record shows that lands involved were in that year first reserved for military purposes by President Fillmore (R. 381), and this Court has held that such a reservation is "an assertion of title and possession." *United States* v. *Oregon,* 295 U. S. 1, 25.

It is therefore submitted that the findings will be accepted by this Court as conclusive unless it can be shown that they are clearly erroneous. (See cases cited at page 22, Brief for the United States.)

2. *The evidence of the Government's possession.*—In the brief for the United States the evidence showing that the United States acquired a valid prescriptive title to the lands in question is fully reviewed (pp. 23–25), and no attempt will be made either to repeat what was there said or to point out more than a few of the numerous inaccurate statements made by respondents on this point (Br. pp. 81–90).

In order to support their contention that the record does not show "any adverse possession" of the lands in suit by the United States, respondents rely (Br. pp. 85–86) upon statements made in the opinion of Mr. Justice Field in *San Francisco Sav.*

Union v. *Irwin,* 28 Fed. 708, 714, a suit involving entirely different lands. Moreover, it should be noted that in that case Mr. Justice Field held that the United States cannot acquire title by adverse possession, but that proposition was expressly overruled in *Stanley* v. *Schwalby,* 147 U. S. 508, which respondents concede to be "the leading case" (Br. p. 93) and in which Mr. Justice Field dissented.

Respondents next purport to show that private parties were in exclusive possession of the area involved here "until 1914 when, following the decision in *Sawyer* v. *Osterhaus, supra,* to the effect that respondents' predecessors had no right to bring ejectment, the Government took possession of the property" (Br. p. 86). In order that this Court may not be misled, attention is directed to the following quotation from the statement of facts given by Judge Van Fleet in *Sawyer* v. *Osterhaus,* 212 Fed. 765, 768:

> The evidence further shows that immediately upon, or soon after, its reservation as a naval station the United States government took possession of Mare Island, including the premises in dispute, established an extensive navy yard, with shops, docks, and other works connected therewith, and has maintained such possession unbrokenly down to the present time for use as a naval station, to the exclusion of all other occupancy thereof, the buildings and other main structures being maintained at the southern end of the island on the higher ground above

> referred to, while the land in dispute has been used for dumpage, storage, and like purposes, with a railway running from the main yard out to the dumps; that levees have been constructed to keep back the flow of tide waters; that the land has been partially filled in and reclaimed by dredging from Mare Island Straits; that roads are maintained thereon; that a line of dolphins on the eastern side is established for anchorage purposes in Mare Island Straits, and sentries are maintained on the land to protect the premises from intrusion and the property of the government from being stolen or carried away.

The facts here of record amply support the Government's claim of title by adverse possession. Respondents make no reference to the recent case of *United States* v. *Oregon*, 295 U. S. 1, which, like the present case, was an action to quiet title brought by the United States. There, this Court held (p. 25):

> Before Oregon was admitted to statehood, the United States is shown to have acquired title which it has never in terms conveyed away. Its possession and claim of title have ever since continued. The Executive Order setting aside the area in question as a bird reservation was an assertion of title and possession. Following the Order, as the Master found, the United States, through representatives of the Department of Agriculture, particularly a resident protector or warden, has taken active

> control of all the lands within the meander line. In the exercise of that control it has excluded hunters, erected posts marking the limits of the reservation, posted notices advising all persons of the existence of the reservation and warning them to refrain from hunting on it. This possession of the United States, under color and claim of title, is not shown to have been disputed or interfered with. As it is sufficient to preclude any action at law in the nature of ejectment, it is an adequate basis for relief in equity to remove the cloud created by the assertion of any inferior title of the State.

Paraphrasing the Court's language and applying it to the intsant case, it may be said: The United States is shown to have acquired title in 1852 (R. 295) which it never in terms conveyed away prior to the patent issued in 1928 (R. 13–16) which this action seeks to cancel (R. 17). Its possession and claim of title has ever since continued (R. 171). The Executive Order of 1853 setting aside the area in question as a navy yard (R. 169–170, 379–381) was an assertion of title and possession. Following the Order as the trial court found, the United States, through representatives of the Navy Department, particularly a resident Commandant, has taken control of all the lands of Mare Island (R. 800, 839, and 171). In the exercise of that control it has erected posts marking the limits of the reservation and advising all persons of its existence and warning them to refrain from trespassing on it (R. 580) and has erected various

types of buildings, structures, and utilities, of a value exceeding $1,250,000.00 used in the operation and activities of petitioner's naval and military forces (R. 171–172). This possession of the United States, under color and claim of title, is not shown to have been disputed or interfered with (indeed, the respondents introduced no evidence and did not controvert any of the foregoing facts). As it is sufficient to preclude any action in the nature of ejectment, it is an adequate basis for relief in equity to remove the cloud created by the patents and the Circuit Court of Appeals manifestly erred in ignoring this source of the Government's title to the lands in question.

It is therefore submitted that the Government's assertion of title acquired by adverse possession of the land prior to 1914, is not in any sense "preposterous" as respondents assert (Br. 87).

3. *The testimony of Captain Carlson.*—One of the principal witnesses at the trial for the Government was Carl A. Carlson, a Captain in the Civil Engineering Corps, United States Navy (R. 762). He testified that he had "prepared from the records a list and location plan of improvements on the land in controversy" (R. 785) and that document was received in evidence, without objection, as "Plaintiff's Exhibit GG" (R. 786). The exhibit shows, as Captain Carlson testified,

> the list of improvements, what the improvements consisted of, . . . the date built, the

approximate cost, whether or not it is still standing, and under "Remarks" whatever was necessary to make it clear (R. 786).

From this exhibit it clearly appears that the Government was in possession of the property long before 1914, having expended nearly a quarter million dollars thereon prior to that date.

Respondents now seek to impugn both the probity of Captain Carlson's testimony and the statements made in the exhibit (Br. pp. 87–89). Of course, such matters will not be considered by this Court, since neither the admissibility nor the weight to be given this evidence were in any way questioned in the trial court. It may be noted, however, that in the cross-examination of this witness, counsel for respondents stated (R. 848), "Captain, it may be interesting for you to know that I believe entirely in your competency, as well as your integrity."

It is therefore submitted that, as stated in the Government's opening brief (p. 26), the evidence establishes "that the United States acquired a valid prescriptive title under the laws of California by satisfying the requirements for such a title not only once but many times over."

4. *Government's prescriptive title unaffected by patent.*—Respondents contend, finally, that the Government's adverse possession of the lands in controversy could not begin to ripen into a valid prescriptive title until the United States has issued a patent to them (Br. pp. 93–94).

The question here involved is not the right of respondents or their predecessors to bring a possessory action, but instead the issue is whether the United States has acquired title by adverse possession. The ejectment cases relied upon by respondents are wholly inapplicable since in none of them was the right of the United States to acquire title by adverse possession involved. In *Stanley* v. *Schwalby,* 147 U. S. 508, this Court expressly held that the United States could acquire title by adverse possession despite the landowners' inability to bring a possessory action of any kind against the Government because, as the Court there held (p. 517), protest by the landowners "and application for redress in the proper quarter" would be "quite as potential" to toll the statute. In the present case the protests of respondents and their predecessors, as has been shown (Br. for the United States, pp. 28–29), were insufficient. Moreover, even assuming that a judicial remedy in the respondents is necessary before adverse possession can begin to run, they at all times had the remedy by mandamus which they finally invoked (Br. for the United States, pp. 27–28).

Little remains that requires answer. Respondents' repeated claim that they and their predecessors have been continuously and vigorously fighting for their lands and protesting against the occupancy by the Government has been shown to be

without merit (Brief for the United States, pp. 28–29). It is therefore submitted that respondents have failed utterly to advance any reason to justify this Court in disturbing the findings of the trial court that the United States has acquired a valid fee title to the lands in question by reason of its long continued and adverse possession of them.

IV

APPLICATION OF SWAMP ACT TO THE LANDS IN CONTROVERSY

With respect to the remaining principle issue raised by the United States—the application of the Swamp Act to lands claimed under a Mexican grant—respondents indicate that this is an "additional" contention not raised below (Br., p. 30). However, it is pleaded by the government (R. 14), found in favor of the United States by the trial court (R. 174), assigned as error by respondents in their appeal to the Circuit Court of Appeals (R. 913, 922–923), and the court below devoted five pages (R. 1004–1009) to the question. Respondents' brief (pp. 73–79) raises no questions of law not discussed in the brief for the United States.

It is respectfully submitted that the decree be reversed and the cause be remanded to the Circuit

Court of Appeals with directions to affirm the decree of the trial court.

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